IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 42 OF 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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THE COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
NUTHERN (P) LTD. - Opponent(s)

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Appearance :
MR. MANISH R. BHATT for Applicant(s).
NONE for the Respondent(s) though served.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 04/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. The present matter relates to the Assessment

Year 1985-86. The Assessee's accounting period is 1st July, 1983 to 30th June, 1984. The Assessee was assessed under Section-143(3) of the Income Tax Act, 1961 (`the Act' for short) by an Order dated 4th January, 1988.

1.1 The Commissioner of Income Tax, Baroda (`the CIT' for short) initiated action under Section-263 of the Act for Assessment Year 1985-86, as, according to him, the income of Rs.3,83,170/- for the accounting period of six months from 1st July, 1984 to 31st December, 1984 had to be assessed as income for Assessment Year 1985-86 and not Assessment Year 1986-87. Exercising his powers under Section-263 of the Act, the CIT set aside the order of assessment and required the Assessing Officer to make a fresh assessment. On one side, the fresh assessment proceedings were going on, while on the other hand, the Assessee challenged the order passed by the CIT in an appeal before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal allowed the said appeal in favour of the Assessee holding, *inter alia*, that the Commissioner was not justified in exercising the jurisdiction vested in him under Section-263 of the Act. The Department/Revenue felt bad of the same and thereafter, made an application for reference in the said matter.

1.2 The Tribunal, accordingly, referred the matter to this Court, which was registered as Income Tax Reference No.213 of 1994, the said Reference came to be disposed of by a Division Bench of this Court on 20th October, 2005 against the interest of the Revenue, holding, *inter alia*, that no fresh material was provided before the CIT, nor there was any justification for the CIT to make an order under Section-263 of the Act. The High Court, accordingly, decided the matter in favour of the Assessee.

1.3 As in the meanwhile, the Assessing Officer proceeded with the assessment proceedings in observance to the order passed under Section-263, the said order came to be challenged before the CIT and ultimately, before the Tribunal. The Tribunal held that in view of its earlier judgement in reference to Section-263 proceedings wherein the Tribunal had quashed the final order passed under Section-263 of the Act, the fresh assessment proceedings would not survive.

1.4 The order was not palatable to the interest of the Revenue, therefore, they again made an application under Section-256(1) of the Act for making a reference to

this Court.

2. The Income Tax Appellate Tribunal, Ahmedabad Bench `A' in relation to I.T. Appeal No.3110/Ahd/1992 relating to Assessment Year 1985-86, has referred the following question for the opinion of this Court:

> *"Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in canceling the order of the assessing officer passed in pursuance of CIT's order u/s. 263 of the Act with regard to the accounting period of 12 months?"*

3. In the opinion of this Court, when the very foundation for making the fresh assessment has been upset and set aside by the Tribunal and the order has been confirmed by the High Court, then, in absence of a legal foundation, the order of fresh assessment cannot be allowed to survive. The facts would show that the order passed by the CIT under Section-263, which conferred jurisdiction on the Assessing Officer to make a fresh assessment, has been set aside and if that be so, then, the earlier order passed under Section-143(3) of the Act would revive and the Assessing Officer would have no jurisdiction to make the fresh assessment.

4. In view of the settled legal position in the facts of this case, we must answer the Reference in favour of the Assessee and against the interest of the Revenue. It is, accordingly, ordered. The Reference stands disposed of. No costs.

[***R.S.Garg, J.***]

[***D. H. Waghela, J.***]

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